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NO. 93-5256

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREDEL WILLIAMSON

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE
ELEVENTH CIRCUIT COURT OF APPEAL

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT, THE UNITED STATES OF AMERICA

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STATEMENT OF THE QUESTION

I.

MAY A CONFESSION OR ADMISSION OF A NONTESTIFYING CODEFENDANT BE ADMITTED INTO EVIDENCE AS A DECLARATION AGAINST PENAL INTEREST WHERE THE FOUNDATIONAL REQUIREMENTS FOR THE RULE ITSELF ARE MET, AS THESE ALSO SATISFY THE CONSTITUTION; AND IS CONSIDERATION OF CORROBORATIVE EVIDENCE OF THE TRUTH OF THE STATEMENT RELEVANT TO THE FOUNDATIONAL/CONSTITUTIONAL INQUIRY?

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INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan, by the Wayne County Prosecutor's Office. The Office of the Wayne County Prosecuting Attorney is the largest in the State of Michigan, and the issue before this Court has arisen with some frequency in the County and thus within the State, with cases currently pending involving the issue before the Court.

Counsel for amicus has appeared before the Court on four occasions, and the Wayne County Prosecutor's Office has appeared on nine occasions. Amicus has also filed as amicus previously before the Court, as well as before the Michigan Supreme Court. The issue before the Court is of great practical and jurisprudential importance, and amicus desires to present its perspective for the possible assistance of the Court.

STATEMENT OF THE CASE

Amicus concurs with the statement of the case of the Government, as Respondent.

I.

A CONFESSION OR ADMISSION OF A NONTESTIFYING CODEFENDANT MAY BE ADMITTED INTO EVIDENCE AS A DECLARATION AGAINST PENAL INTEREST WHERE THE FOUNDATIONAL REQUIREMENTS FOR THE RULE ITSELF ARE MET, AS THESE ALSO SATISFY THE CONSTITUTION; CONSIDERATION OF CORROBORATIVE EVIDENCE OF THE TRUTH OF THE STATEMENT IS RELEVANT TO THE FOUNDATIONAL/CONSTITUTIONAL INQUIRY.

Introduction

When Bruton v United States, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968) was decided, the joinder and severance/confrontation clause issue there was occasioned by the fact that the codefendant's confession was not admissible against the defendant under any recognized hearsay exception, and thus the issue became whether the jury was capable of following a limiting instruction, limiting the use of the statement to the declarant. This Court held not. Bruton was careful to note that "the hearsay statement inculpating

petitioner was clearly inadmissible against him under traditional rules of evidence....we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause...." 391 US at 128, fn 3. At the time Bruton was decided the Federal Rules of Evidence were not yet in place, and, despite the strenuous objections of evidence scholars and commentators, see e.g. McCormick, Evidence (2d Edition), p.673-675, the declarations against interest hearsay exception was generally held to apply only to declarations against pecuniary interest. With the acceptance of declarations against penal interest as a hearsay exception, the Confrontation Clause issues regarding substantive admission of a nontestifying codefendant's confession against a defendant have come to the fore.

I. The Development of the Confrontation Clause Test: "Sufficient Indicia of Reliability So As To Afford the Trier of Fact A Satisfactory Basis For Evaluating The Truth of the Statement

Wigmore points out that the confrontation clause is related to the rules concerning hearsay, and that the history of the hearsay rule began only in the 1500's. Up to that time, though jury trial had come into being, it was a common practice for the jury to obtain information from informed persons not called into court. Testimony in open court was a rare event. Testimony in open court began to develop during the 1500's and 1600's, reversing the earlier order, with testimony becoming common, and consultation by the jury with informed persons not called into court becoming rare. The question began to arise whether hearsay was competent evidence in the presentation of evidence in court. See 5 Wigmore, Evidence, sec.

1364.

The infamous trial of Sir Walter Raleigh in 1603 for treason is often thought of as the progenitor of the Constitutional Confrontation Clause. Raleigh had no assistance from counsel, and would not have been allowed to call witnesses had he wished to do so. The only defense of the accused was that the case against him had to be completely proved. If it was, there was no need of witnesses from the accused; if it was not, there was likewise no need for witnesses from the accused. Raleigh insisted that the case could not be proven unless he faced his accusers. Reams of deposition testimony by Raleigh's alleged accomplice were admitted, depositions which themselves contained only innuendo and no credible assertions of substance sufficient to support a conviction. Yet Chief Justice Popham refused to produce the alleged

accomplice, Cobham, to testify, stating that "where no circumstances do concur to make a matter probable, then an accuser may be heard in court, and not merely by extrajudicial statement, but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced." 5 Wigmore 1364, p. 16-17; See California v Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (fn 9 and 11, p.507-508)

By the later 1600's and early 1700's, the rule against hearsay had come to be established, with the qualification that it could be used as corroboration, and with several exceptions to application of the rule. Thus, the common law rule of confrontation was a rule requiring confrontation, except where exceptions to the rule of hearsay existed. Wigmore, supra. In other words, the right of cross-examination

secured by the common law was not a right devoid of exceptions. McCormick, Evidence, p. 580-581; 5 Wigmore 1397, p.158

The argument that the Confrontation Clause is absolute, and that thus no hearsay can ever be admitted into evidence, has never been accepted. It has also been argued that the Confrontation clause constitutionalized the hearsay rule as it existed at the time of the adoption of the Sixth Amendment. This view is equally untenable. The law of evidence is still subject to thoughtful alteration, and this Court has developed a test for determining whether an alteration in the law of evidence satisfies the Confrontation Clause.

In a somewhat early case on the subject, Pointer v Texas, 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065 (1965), it

was held that the introduction at trial of an unavailable witness's examination testimony was constitutionally impermissible where defendant had no counsel at the examination and no opportunity to cross-examine the witness. Speaking for the Court Justice Black noted:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. 13 L Ed 2d at 926.

This sweeping language must, however, be viewed as dicta, and as dicta impliedly rejected by later cases, for if taken as written it would outlaw the use of all hearsay statements, including those within the recognized exceptions.

That confrontation cannot so readily be equated with cross-examination; indeed that confrontation cannot be viewed as cross-examination with the exception of

those hearsay exceptions recognized at the time of the adoption of the Sixth Amendment, is apparent from California v Green, supra. Involved was a California statute which allowed the prior inconsistent statements of a witness testifying at trial to be admitted as substantive evidence. The Court noted that the generally recognized purpose of the Confrontation Clause is to prevent trial by ex parte affidavit. Justice White, speaking for the majority, went on to discuss the relationship between the Confrontation Clause and hearsay rules:

> While it may readily be conceded that the hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is com plete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law....merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion

> that confrontation rights have been denied. 26 L Ed 2d at 495.

Justice White further remarked that even had the witness not been present at trial, his prior statement, in the form of examination testimony, could have been admitted as substantive evidence without constitutional difficulty, because at his examination his counsel was not "significantly limited in any way in the scope or nature of his cross-examination of the witness...." 26 L Ed 2d at 501.

In a thoughtful concurrence Justice Harlan observed that the decision of the California Supreme Court was the result of decisions of the United States Supreme Court which "indiscriminately equated 'confrontation' with cross-examination'":

> If 'confrontation' is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need

> hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course. 26 L Ed 2d at 505.

Justice Harlan went on to call for a "fresh look" at the constitutional conception of confrontation.

In Dutton v Evans, 400 US 74, 27 L Ed 2d 213, 91 S Ct 210 (1970) the Court once again wrestled with the relationship between the Confrontation Clause and cross-examination. A Georgia statute, which allowed admission as substantive evidence statements of a coconspirator during the "concealment phase" of the conspiracy, was attacked on confrontation grounds. Justice Stewart, writing for a four justice plurality, with Justice Harlan concurring, stated that:

> The decisions of this court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact

> (has)a satisfactory basis for evaluating the truth of the prior statement.' (27 L Ed 2d at 227, citing California v Green, emphasis added).

The Court held that:

> From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but what he has heard. 27 L Ed 2d at 226.

Justice Harlan, in his concurring opinion, continued his "fresh look" at confrontation, reaching the conclusion that the position espoused by Wigmore is the correct view:

> The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infra-judicially, - this depends on the law of Evidence for the time being - but only what mode of procedure shall be followed i.e. a cross-examining procedure - in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially (emphasis added). 5 Wigmore, 1397, p. 131.

Justice Harlan, then, reached the position that questions of hearsay

exceptions and the absence of cross-examination are not Confrontation Clause problems at all, but due process problems. 27 L Ed 2d at 231.

Another case indicating that the mission of the Confrontation Clause is not solely cross-examination is Mancusi v Stubbs, 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308 (1972). The case dealt with the use of prior recorded testimony, and the Court stated:

> The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' (citations omitted).

The Court found the cross-examination adequate so as to give the testimony "sufficient indicia of reliability" to afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." 33 L Ed 2d at 303.

A somewhat more recent case in the area is Ohio v Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531 (1980), another prior recorded testimony case. The Court observed that the Confrontation Clause reflects a "preference" for face-to-face confrontation at trial, and that a primary interest it secures is that of cross-examination. However, this preference may be overcome, principally upon a showing of sufficient indicia of reliability.

In United States v Inadi, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121 (1986) this Court considered the constitutionality of FRE 801(d)(2)(E), the coconspirator's declarations hearsay exception, in that the Rule does not require unavailability. Holding that "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court-statement can be introduced

by the government without a showing that the declarant is unavailable," 106 S Ct at 1126, the Court upheld the Rule.

The teaching of these cases, then, along with others, is that confrontation cannot be equated with cross-examination, and that hearsay may be admitted substantively if there are "sufficient indicia of reliability so as to provide the trier of fact a satisfactory basis for determining the truth of the statement." It is not the role of the trial court to determine whether the statement is true, or to admit it only if it is subject to no conceivable attack, but to determine whether there is a satisfactory basis for the trier of fact to come to a conclusion as to its veracity.

II. The Sufficient Indicia of Reliability Test and Declarations Against Penal Interest: What Is Relevant To The Inquiry?

A) Firmly Rooted Exceptions

One approach to the reliability inquiry was marked out in Bourjaily v United States, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775 (1987). The defendant was charged with conspiracy to distribute cocaine. At trial the government introduced taped conversations between an intermediary and a government informant, the intermediary, in arranging a sale of drugs, referring to his "friend" (the defendant) who would be the ultimate recipient, and who had certain questions. At the delivery point the intermediary and the defendant were arrested, in possession of funds in the amount of the agreed purchase price for the drugs. The sixth circuit agreed with the trial court that the government had established by a

preponderance of evidence the existence of a conspiracy, and that the statements were in furtherance of it; the court also rejected a Confrontation Clause challenge.

This Court, through Chief Justice Rehnquist, held that FRE 104(a) permits the court, in deciding to admit a statement under FRE 801(d)(2)(E) as a coconspirator's statement in furtherance of a conspiracy, to consider the hearsay statement sought to be admitted itself in making the preliminary factual determination whether it is more likely than not that there was a conspiracy involving the declarant and the party against whom the statement is offered, and that the statement was made "in the course and in furtherance" thereof. Critically, the Court held that the Confrontation Clause does not require a trial court to make a separate inquiry

into the reliability of a statement that **satisfies** the requirements for admission under a "firmly rooted" hearsay exception, the exception for coconspirator's statements being such a rule.

One question now before the Court is whether the declaration against penal interest hearsay exception is "firmly rooted," so that a satisfaction of the foundational requirements of the rule ("so far contrary to penal interest it would not have been said unless true") is the end of the inquiry, or whether an independent inquiry into reliability must be undertaken, and, if so, what evidence is relevant to the inquiry. As a related matter, also at issue is whether, even if the declaration against penal interest is not firmly rooted, a rigorous application of its foundational requirements is sufficient nonetheless to satisfy the

"sufficient indicia of reliability" test. The course of the law has not run smooth, which, undoubtedly, has brought this case to this Court.

B) The Independent Inquiry Into Reliability: Is Evidence Corroborating the Truth of Portions of the Statement Relevant?

Central to the questions involved here is the decision in Lee v Illinois, 476 US 530, 90 L Ed 2d 514, 106 S Ct 2056 (1986). In Lee the trial judge at a bench trial expressly relied upon portions of the codefendant's confession in finding defendant Lee guilty of murder, squarely presenting the declaration against penal interest/Confrontation Clause issue. The codefendant, Thomas, had implicated both himself and defendant in the crimes, and the only apparent theory of admissibility of his statement against defendant was the declarations against penal interest

exception. Justice Brennan for a five member majority declined to accept the state's characterization of "the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S Ct at 2064, fn 5. In other words, Lee involved a declaration against penal interest, but a particular kind or sort of declaration against penal interest; namely one which declares not only that the declarant is guilty of criminal conduct but that another party is also. Under these circumstances, the majority found that the State's "grounds for holding Thomas' statement to be reliable with respect to Lee's culpability" did not meet the Confrontation Clause

standard of demonstrating substantial indicia of reliability.

This Court found reliability lacking primarily due to its conclusion that there was a clear divergence between the confession of the codefendant and that of the defendant as to the participation of the parties in the murders--"The discrepancies between the two go to the very issues at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." 106 S Ct at 2065. Because, then, of these conflicts, and the well-recognized motivation to shift blame or curry favor, the majority was "not convinced that there exist sufficient 'indicia of reliability,' flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions, to overcome the weighty

presumption against the admission of such uncross-examined evidence." 106 S Ct at 2065.

Justice Blackmun, for a four member dissent, observed that in Bruton the inadmissibility of the codefendant's statements as against the defendant was not contested, and that Bruton therefore only applies to "situations in which the out-of-court statements are constitutionally inadmissible against the defendant," and disagreed with the majority's conclusions as to reliability, stating that in the case before the Court "there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner." 106 S Ct at 2068. Justice Blackmun concluded that "in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually

strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner." 106 S Ct at 2071.

In Lee, neither the majority nor the dissent took issue with the proposition that a declaration against penal interest can be admitted, consistent with the Confrontation Clause, against a codefendant; the disagreement was on the facts. Moreover, both the majority and the dissent **looked to evidence outside the circumstances surrounding the actual making of each statement** to examine its reliability; namely, the confession of the other defendant.

That evidence other than the circumstances surrounding the making of the statement at issue can be considered in the reliability inquiry was also indicated in Cruz v New York, 481 US

186, 95 L Ed 2d 162, 107 S Ct 1714 (1987). Two brothers were tried for murder, and the confession of each was admitted at the joint trial, under a limiting instruction that the jury was to consider each confession only against the maker. No redaction was undertaken because the confessions "interlocked," and Parker v Randolph, 442 US 62, 60 L Ed 2d 713, 99 S Ct 2132 (1979) had held (by a plurality) that in such a situation the fear that a jury would not follow a limiting instruction was unfounded. Based on Parker, the New York courts affirmed.

A five member majority, through Justice Scalia, disagreed with the Parker plurality, and did away with the interlocking confession doctrine--a nontestifying codefendant's confession that incriminates the defendant but is not directly admissible against him may

not be introduced at their joint trial even if the jury is instructed not to consider the codefendant's confession against the defendant. The majority reasoned that a codefendant's confession which confirms the defendants confession could be enormously damaging where a defendant is seeking to disavow his statement--in this situation a jury might well disregard a cautionary instruction. However, the Court also remarked that the defendant's confession does bear on whether the nontestifying codefendant's confession has sufficient indicia of reliability to be **directly admissible** against the defendant (without redaction or a limiting instruction, as a declaration against penal interest) despite the lack of opportunity for cross-examination. Again, then, this Court suggested that evidence corroborating the reliability of the

statement may be considered in the reliability inquiry, and not only the circumstances surrounding the making of the statement. Then came Idaho v Wright.

In Idaho v Wright, 111 L Ed 2d 638 (1990) the defendant, a woman, was charged with lewd conduct with a minor for having jointly committed the crimes against her two daughters (one 5 1/2, the other 2 1/2) by holding them down to permit her codefendant to have sexual intercourse with each. The examining pediatrician, who examined the younger girl, asked her whether sexual abuse occurred between her and the two codefendants, and was allowed to testify to her answers. She did not testify at trial, as she was found not competent. The trial court admitted the statements under IRE 803(24), the Idaho analogue to the federal "catch-all" hearsay exception, which requires a showing of

circumstantial guarantees of trustworthiness, as well as materiality, and a sort of necessity.

The Idaho Supreme Court majority found that the interview with conducted by the doctor lacked sufficient "procedural safeguards" so as to provide sufficient indicia of trustworthiness under the Confrontation Clause, relying principally on the fact that the session was not recorded on videotape, and that leading questions were used (the child, it should be remembered, was 2 1/2 years old at the time). The majority also quoted extensively from developmental psychology texts and articles.

This Court affirmed, applying the Court's previously established framework for review of hearsay exceptions as they relate to the Confrontation Clause--whether there were sufficient indicia of reliability so as to render

the statements in question trustworthy, where a "firmly rooted" hearsay exception is not involved--the majority found an absence of sufficient indicia of reliability. The majority also found that such indicia must be found from the totality of the circumstances, specifically rejecting the elaborate and specific requirements mandated by the Idaho Supreme Court, and noted above. Viewing the totality of the circumstances, rather than any particular set of factors, the majority found that <u>the relevant circumstances are those surrounding the making of the statement, and not other evidence corroborating the statement</u>; by way of example, the court cited spontaneity and consistent repetition, the mental state of the child, the use of terminology unexpected of a child of similar age, the lack of a motive to fabricate. Largely because of

the suggestive manner of the questioning, the majority concluded that the child's statements were not admissible. Wright, then, is in tension with Lee and Cruz on the manner in which reliability is to be examined, a tension which can be resolved in this case.

III. Declarations Against Penal Interest, the Reliability Inquiry, and the Lower Courts

A number of cases from the federal circuits and from state courts have addressed the declaration against penal interest question. In United States v Lilley, 581 F2d 182 (CA 8, 1978), cited by Petitioner in the petition, the Government offered into evidence the statement of defendant's husband, and argued that it satisfied FRE 804(B)(3) as an inculpatory declaration against penal interest (an "inculpatory declaration against interest" is the shorthand that

the federal courts have developed for a declaration against penal interest which inculpates someone in addition to the declarant). The Eighth Circuit disagreed. The court held first that in fact the statement was not so far contrary to the declarant's penal interest that it would not have been said unless true--Mr. Lilley "attempted to foist the blame" on his wife, "exculpating himself, or at least minimizing his criminal liability." 581 F2d at 187. Thus, the foundation of the rule itself was not met. The remaining discussion regarding inculpatory statements against interest is dicta. Moreover, it is dicta not followed by the Eighth Circuit itself, as demonstrated by United States v Riley, 657 F2d 1377 (CA 8, 1981).

In Riley the defendant was convicted of transporting a minor in interstate

commerce for the purposes of prostitution. The only issue was the intent of the defendant when he transported the minor. The statement of a witness incriminating herself and the defendant was admitted into evidence. The court observed by way of introduction that "The admissibility of collateral inculpatory declarations against penal interest under FRE 804(b)(3) presents a controversial and complex evidentiary problem." 657 F2d at 1380-1381. The court found that the case law in the circuit had "tested inculpatory declarations under FRE 804(b)(3) and thus implicitly assumed their admissibility" (citing cases), 657 F2d at 1382, but found a lack of any "comprehensive analysis" in the cases, largely because in these cases the declaration at issue "was found to have been inadmissible under the rule itself, for example,

because the declaration was not in fact against the penal interest of the declarant at the time it was made," citing Lilley as an example. 657 F2d at 1382. The court went on to accept the admissibility of inculpatory declarations against interest, under the requirements that 1)the declarant is unavailable, as required by the rule, 2)the statement must be so far contrary to penal interest that a reasonable person would not have said it unless true, and 3)corroborating circumstances clearly indicate the trustworthiness of the statement, the final requirement viewed as necessary under the Confrontation Clause. See 657 F2d at 1383, and fn 7. Proceeding to the analysis, the court found that the statement of the declarant was not against her interest under the circumstances, failing the second prong of the test, one contained in the rule of evidence itself.

The Third Circuit cases of United States v Palumbo, 639 F2d 123 (CA 3, 1981) and United States v Bailey, 581 F2d 341 (CA 3, 1978) are also relevant, Palumbo being cited in Petitioner's petition for certiorari. Bailey simply found that the statement was not sufficiently against interest, because made after the declarant "had been offered a bargain involving dismissal of one count of the indictment against him." As the court noted, even the Government "has not pressed its argument on this point here...." 581 F2d at 345. Bailey scarcely rejects, either implicitly or explicitly, the doctrine of inculpatory declarations against interest.

Palumbo holds that inculpatory declarations may be admitted. The court found that the inculpatory statement was not so far against interest that it would

not have been said unless true, but may have been said to "curry favor with the authorities" (though the court noted that the question was not free from doubt). The majority also specifically agreed with the concurring opinion with regard to its explication of the "subtleties of the rule and its application to this case." 639 F2d at 128, fn 5. In that concurrence Judge Adams discussed in detail the history of FRE 804(b)(3), to be discussed subsequently in this argument, as well as the case law, and concluded that the rule allows admission of inculpatory declarations against interest "provided, of course, that admission would not abridge the defendant's rights under the Confrontation Clause of the Sixth Amendment." Judge Adams required, then, the same reliability inquiry as required by the Eighth Circuit.

In the Fifth Circuit, the case of United States v Sarmiento-Perez, 633 F2d 1092 (CA 5, 1981) speaks to the question. The court there clearly held that, where the Constitution is satisfied, inculpatory declarations against interest are admissible under the rule of evidence: "...inculpatory statements against interest are admissible under Rule 804(b)(3) and the confrontation clause of the sixth amendment only if they meet a three-part test....", the court citing the same test followed by the Eighth Circuit, detailed earlier (unavailability, so far contrary to interest that would not have been said unless true, circumstances clearly indicating trustworthiness). In short, the court held that both the rule of evidence and the constitution must be satisfied for the statement to be admissible.

A very important Fifth Circuit case, involving inculpatory declarations against interest given by one in custody, is United States v Vernor, 902 F2d 1182 (CA 5, 1990). There the court began by noting that "after joining his father in a clumsy and botched robbery, leaving a trail of signals worthy of a hired trail blazer, the time came for Gary Keith Vernor to answer to a jury...." Three custodial confessions made by the senior Vernor were admitted into evidence against the defendant (the senior Vernor was convicted at a prior trial, and refused to testify at his son's trial). These statements were admitted under FRE 804(b)(3), and the Fifth Circuit affirmed. In examining them for reliability, the court observed that the foundational requirements of the rule itself go to reliability, as they require a showing that the statement "so

far tended to subject (the declarant) to criminal liability...that a reasonable man in his position would not have made the statement unless he believed it to be true." This threshold was clearly met in the case before it, held the court. As to those portions of the statement incriminating the son, the court found them also reliable, as the father "unambiguously took full responsibility for his own part in the bank robbery. He made no attempt to minimize his own role or to shift the blame from himself to Gary. There is nothing in the record to support an inference that Fred made the statements implicating Gary in an attempt to avenge himself.....There is nothing in the record that indicates that Fred was motivated by a desire to curry favor with his interrogators. There is no evidence that the police...made any promises to Fred or they gave him any reason to

believe that it would help him if he inculpated his son...his statements were made voluntarily...." 902 F 2d at 1188.

Other circuits have also accepted the admissibility of declarations against penal interest, subject to inquiry under the Confrontation Clause. See e.g United States v Layton, 855 F2d 1388 (CA 9, 1988) (the court found that a statement of a nontestifying individual was both a declaration against penal interest, and satisfied the Confrontation Clause; the statement was against penal interest, not done to curry favor, and not designed to shift blame); United States v Garcia, 897 F2d 1413 (CA 7, 1990) (finding the evidentiary inquiry and the constitutional inquiry to be one and the same); United States v Katsougrakis, 715 F2d 769 (CA 2, 1983); United States v Seeley, 892 F2d 1 (CA 1, 1989) ("the

exception for declarations against penal interest would seem to be 'firmly rooted'"). Plainly, the law in the federal system allows the admission of inculpatory declarations against interest, where consistent with the Constitution. Of particular additional interest is the Seventh Circuit case of United States v York, 933 F2d 1343 (CA 7, 1991).

In York the court considered the declaration against interest of a codefendant. The court upheld admission of the statement against both Confrontation Clause challenges and a claim that the portions of the statement inculpating the defendant were not within the hearsay exception. As to the claim that the inculpatory portion of the statement is simply not within the hearsay exception, the court flatly rejected it, and for sound reasons. The court observed that "Admitting

inculpatory statements against interest recognizes...the broader purpose behind this and other hearsay exceptions as well--to permit the use of evidence that is trustworthy (for whatever particular reason) and to exclude that which is unreliable." Moreover, the court pointed out that

> There is little question that the drafters of the Rules of Evidence and Congress intended Rule 804(b)(3) to permit admission of inculpatory statements where consistent with the confrontation clause....The advisory committee's notes reflect the view that a statement admitted under the rule '**may include statements implicating (another), and under the general theory of declarations against interest they would be admissible as related statements.**' ....Moreover, Congress deleted a provision from the rule that would have prohibited the use of inculpatory statements against interest, 'to avoid codifying or attempting to codify, constitutional evidentiary principles....' S. Rep. No. 93-1277, ...The Report discussing this deletion went on

> to observe that '(c)odification of a constitutional principle is unnecessary and, where the principle is under development, often unwise.' 933 F 2d at 1361 (emphasis supplied)

The court concluded that "To be admissible under rule 804(b)(3), then, the inculpatory portion of a statement against interest must be sufficiently reliable to satisfy the confrontation clause. **There seems little reason to treat the requirement of reliability differently in each context. Such an approach would be needlessly complex, requiring two bodies of case law where one will do.**" 933 F 2d at 1361 (emphasis added).

Two state recent state cases are also important to the point. The New Hampshire Supreme Court had occasion to consider the admissibility of inculpatory declarations against interest in State v Kiewert, 605 A2d 1031 (N.H. 1992). The wife of one perpetrator of the crime

was allowed to testify to a telephone call she had received from her husband that he and the defendant had just committed an assault and robbery, that he was on the run, and he would not be coming home any more. Shortly thereafter the police pulled over the truck stolen in the robbery, and the witness's husband, the declarant, committed suicide as the police approached. The New Hampshire Supreme Court noted "at the outset that New Hampshire Rule of Evidence 804 'adopts the Federal Rule 804.' NHREv 804 (reporter's notes). We will, therefore, look to federal cases interpreting Federal Rule of Evidence 804 to assist us in construing the New Hampshire rule." 605 A2d at 1034. The court rejected the defendant's claim that "the part of the declarant's statement which incriminated the defendant is not against the declarant's penal interest

and, therefore, is inadmissible hearsay." 605 A2d at 1035. Discussing many of the federal cases previously cited by appellant here, particularly the York decision, the court held that inculpatory declarations against interest are admissible so long as the foundation of the rule itself is met, and the Confrontation Clause is met as well; that is, that there are sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement (see infra).

Finally, amicus would mention People v Poole, 444 Mich 151 (1993). There the Michigan Supreme Court held that an inculpatory declaration against may be admitted if the Confrontation Clause is satisfied, and discussed factors it believed appropriate to the reliability inquiry: weighing in favor of admission are declarations which are 1)voluntarily

given, 2)made contemporaneously with the events, 3)noncustodial; that is, made to family, friends, colleagues, or confederates, 4)uttered spontaneously at the initiation of the declarant. Weighing against admission would be a statement 1)made to law enforcement officers at their prompting, 2)a statement minimizing the role of the declarant or shifting blame, 3)a statement made to avenge the declarant or to curry favor, and 4)a statement where the declarant had a motive to lie or distort the truth. The court can also consider any other circumstances going to reliability, and **the presence or absence of a particular factor is not decisive**, the totality of the circumstances being looked to on the reliability inquiry. That the statement was custodial is not a factor which weighs in favor of admission, then, but it is not outcome determinative on the question.

IV. Synthesis

A) The Firmly Rooted Exception Approach

As stated previously, this Court has said that "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'..." Is the declaration against penal interest a firmly rooted exception, so that satisfaction of its foundation (that the statement is so far against penal interest that it would not have been said unless true) also may be said to satisfy Confrontation Clause reliability concerns? In United States v Layton, supra, the court noted that "The Supreme Court has not decided whether the declaration against penal interest is such an exception. Four justices, however, have issued an opinion so finding ....This court has expressly reserved the question without deciding

it....we do not decide whether declarations falling within the scope of Rule 804(b)(3) are presumptively reliable." 855 F 22d at 1405, fn 5.

It might seem peculiar to argue that the declaration against penal interest exception is "firmly rooted" when it was not a recognized exception at the time Bruton v United States was decided, and did not gain full force until the promulgation of the Federal Rules of Evidence. But a careful analysis reveals that the reason the declaration against penal interest exception, as contrasted to the declaration against pecuniary interest exception, did not have wide acceptance until relatively recently, is that for a period of time in the history of the law of evidence the law went backwards, as it were, and has now been restored on its correct path.

Wigmore has fully explained that the period of history when only declarations against pecuniary interest and not declarations against penal interest were accepted as hearsay exceptions was aberrant. As he observes, by 1800 it was fully accepted that "all declarations of facts against interest" were to be received (emphasis in original). 5 Wigmore, sec. 1476, p.350. This included declarations against penal interest. See e.g. Hutlet's Trial, 5 How St. Tr 1185, 1192 (1660); Standen v Standen, Peake 32 (1791); Powell v Harper, 5 Carr and P 590 (1833); 1 Hale, Pleas of the Crown 306 (1680), all discussed in Wigmore, sec. 1476, fn. 8. However, in The Sussex Peerage Case, 8 Eng Rep 1034 (1844) the House of Lords, in a case "not strongly argued", 5 Wigmore, sec. 1476, p.351, "ignored precedents" (McCormick,

Evidence, sec. 278, p.322 (3rd Edition)) and held that the declarations against interest hearsay exception was limited to facts against pecuniary or proprietary interest, but excluded facts against penal interest. Wigmore called this a "backward step," placing an "arbitrary limitation" on the rule, which, unfortunately, was accepted, "although it was plainly a novelty at the time of its inception" (emphasis supplied), 5 Wigmore, p. 351. Its condemnation by scholars was universal, until finally the step backward was retraced. See e.g. Wigmore, McCormick, Donnelly v United States, 228 US 243, 277, 57 L Ed 820 (1913), Holmes dissenting; Lee v Illinois, infra, 90 L Ed 2d at 533, fn. 4, Justice Blackmun dissenting.

At least one circuit has recently accepted the view that the declaration against penal interest is firmly rooted,

the Seventh Circuit, in the York case. The court stated:

> Our holding in Garcia (897 F2d 1413 (CA 7, 1990)) was tantamount to saying that the exception is well-rooted within the meaning of Roberts and Bourjaily, and we affirm that view today....So long as the incriminating and inculpatory portions of a statement are closely related..., if the circumstances surrounding the portion of a declarant's statement inculpating another are such that the court determines that the inculpatory portion of the statement is just as trustworthy as the portion of the statement directly incriminating the declarant, there is no need to excise or sever the inculpatory portion of the statement (emphasis supplied, 933 F2d at 1363-1364).

See also the First Circuit case of United States v Seeley, supra ("the exception for declarations against penal interest would seem to be 'firmly rooted'").

Amicus submits that the declaration against penal interest is a firmly rooted hearsay exception, so that if its foundational requirement is truly met,

the statement, including that part which inculpates another, is admissible. As noted, the advisory committee notes to the Federal Rule state that a declaration against interest "**may include statements implicating (another), and under the general theory of declarations against interest they would be admissible as related statements.**" Dean Wigmore was of this same view:

> since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy...it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to **every fact contained in the same statement**. 5 Wigmore, Evidence (Chadbourn rev, s.1465, p.339 (emphasis in original).

B) **Consideration of Corroborative Evidence**

Amicus submits that Wigmore is correct in his approach that the entire

statement should be admitted because made while the declarant was in a trustworthy state of mind. With a dying declaration or excited utterance, the state of mind of the declarant is revealed by the circumstances surrounding the making of the statement, which reveal a trustworthy state of mind: one would not lie regarding the circumstances of his injuries while in fear of dying, and one would not lie while speaking under the excitement caused by a startling event. The declaration against penal interest is viewed as trustworthy, however, not only because of the circumstances under which it was given, but because of its content; a person would not likely lie regarding their participation in a crime. This means that the trustworthy state of mind is revealed principally by the content of the statement, rather solely than by the circumstances of its making. And, of course, the circumstances are relevant

--for example, if coerced, the statement is not reliable despite its content. But the incriminating nature of the statement reveals that the declarant is of a state of mind to speak truthfully regarding the event, and whatever is said about the entire criminal episode, including that incriminating others, is part of what happened, and should be admissible under the rule. This does not mean that any statement against penal interest is automatically admissible, for either the circumstances or the content may show that the declarant was not in a trustworthy state of mind, but of a mind to shift blame, or curry favor. Exploration of these circumstances is a part of the admissibility inquiry, but if this reliability inquiry is satisfied, demonstrating the trustworthy state of mind of the declarant, then all facts in his or her statement which relate to the criminal event should be admissible under

the rule.

The York court observed that the inquiry as to whether the declaration against penal interest was "so far contrary to penal interest it would not have been said unless true" is the same inquiry that would be undertaken under the Confrontation Clause in any event, so that the development of two bodies of case law "when one will do" is not necessary. The degree to which the declarant exposes him or herself to culpability, any shifting of blame, motive to shift blame or curry favor, any involuntariness, any threats or promises, whether the statement is custodial or not, all go into the inquiry as to whether the rule has been satisfied, and, whether the rule be deemed firmly rooted or not, if reliability is determined under the rule, then a showing has been made of "sufficient indicia or reliability to afford the trier of fact a

satisfactory basis to evaluate the truth of the statement."

The remaining point is whether, in determining whether the declaration is "so far contrary to penal interest it would not be said unless true," which includes an examination of factors such as custody, desire or motive to curry favor, desire or motive to blame-shift, actual blame-shifting, and so on, consideration of evidence which supports the truth of facts contained within the statement by corroborating them can be considered, or whether only the "circumstances surrounding the making of the statement," as stated in Idaho v Wright, may be considered.

Amicus submits that, at least with the declaration against penal interest, facts which corroborate the reliability of the statement, as well as the circumstances surrounding the making of

the statement, should be considered in the reliability inquiry. In order to determine whether the statement is so far contrary to penal interest it would not have been said unless true this inquiry may be necessary. One can admit liability as an accomplice, while naming another as the principal. Though the legal culpability of the two may be the same, it could still be argued that the declarant was attempting to shift or spread blame; however, it could also be that the declarant was simply accurately describing the criminal episode. If there is other evidence supporting the version of events given by the declarant, then that evidence is highly probative on the question of whether the statement given is "so far contrary to penal interest it would not have been said unless true," or was said to shift blame or share blame. The evidence does go to

reliability, and since the question is whether the trier of fact will have a satisfactory basis to evaluate the statement, other corroborative evidence could certainly be considered by the jury in determining the weight and credibility of the evidence, and thus should be considered by the trial court in determining whether a satisfactory basis for evaluating the truth of the statement exists.

In this regard amicus would point out that it must be born in mind that the question is whether there is "sufficient indicia of reliability" so as to afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement," a test which is met here. The question is not whether there is no other possibility than that, to the satisfaction of the trial judge (and the appellate courts) the statement is true.

It is the duty of the court to determine whether there is a satisfactory basis for the factfinder to base a decision as to whether the statement is true or false, that ultimate decision resting with the factfinder and not the court.

Amicus submits, then, that the declaration against penal interest is a firmly rooted exception, so that satisfaction of the foundational requirements for the rule satisfies the Confrontation Clause test; moreover, even if the declaration against penal interest is not viewed as firmly rooted, the foundational requirements of the rule encompass the reliability inquiry that should be undertaken in any event, and in undertaking that inquiry consideration of evidence which corroborates the truth of the statement, and thereby its reliability, should be permitted, given that the "trustworthy state of mind" of the declarant is revealed, with a

declaration against penal interest, by the content of the statement as well as the circumstances under which it was given.

Conclusion

Amicus would request, then, that this Court hold that satisfaction of the foundational requirements for the declaration against interest exception is sufficient to satisfy the Confrontation Clause test that there be sufficient indicia of reliability to afford the trier of fact a satisfactory basis to evaluate the truth of the statement (with the fact that the statement is either custodial or noncustodial being but one factor in the inquiry), either because the declaration against interest is a firmly rooted hearsay exception, or because the satisfaction of the foundational requirements are identical with the Confrontation Clause inquiry in any event. In determining whether

sufficient indicia of reliability exist to afford the trier of fact a satisfactory basis for evaluation of the truth of the statement, amicus submits that the Court should hold that consideration of evidence which corroborates the reliability of the statement, in addition to the circumstances surrounding the making of the statement, is relevant to the inquiry.

CONCLUSION

Wherefore, amicus respectfully requests that the judgment of the Eleventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

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